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70-209

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 12

Conclusion 17

Appendices:

Appendix "A"—Opinion of Court of Appeals ....App. 1

Appendix "B"—Judgment of Court of Appeals ..App. 7

Appendix "C"—Order Denying Rehearing .....App. 8

Appendix "D"—Order Denying Stay of Mandate App. 9

Appendix "E"—Order affirming judgment of District Court .....App. 10

Appendix "F"—Opinion .....App. 21

TABLE OF AUTHORITIES CITED

Cases

Aiuppa v. United States, 10 Cir., 393 F.2d 597 2

Aiuppa v. United States, 10 Cir., 338 F.2d 146 ..... 2, 4

Chapman v. California, 386 U.S. 18 16

Coppedge v. United States, 272 F.2d 504 .....12, 15

Giordano v. United States, 394 U.S. 310 .....2, 10

Griffin v. California, 380 U.S. 609 .....3, 16

PAGE

Henslee v. United States, 246 F.2d 190 ..... 12, 15

Janko v. United States, 366 U.S. 716 ..... 12, 14

Marshall v. United States, 360 U.S. 310 14

Marson v. United States, 203 F.2d 904 ..... 12, 15

Sheppard v. Maxwell, 384 U.S. 333 12

United States v. Accardo, 298 F.2d 133 15

United States v. D'Antonio, 342 F.2d 667 (7th Cir. 1965) 15

United States v. Largo, 346 F.2d 253 ..... 12, 15

United States v. Palermo, 410 F.2d 468 ..... 12, 15

United States v. Panczko, 353 F.2d 676 (7th Cir. 1966) 15

Other Authorities

28 U.S.C. §1254(1) 2

18 U.S.C. §3481 17

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO.

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Joseph Aiuppa, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming a judgment of conviction entered by the United States District Court for the District of Kansas.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the appendix to this petition (Appendix "A"). The judgment of the Court of Appeals is printed

as Appendix "B". The order denying rehearing entered May 10, 1971, is printed as Appendix "C". The order denying a stay of mandate entered May 18, 1971, is printed as Appendix "D".

Since this is a Petition for a Writ of Certiorari to review the third opinion of the Court of Appeals in this cause, the prior opinions of the Court of Appeals which are reported as *Aiuppa* v. *United States*, 10 Cir., 393 F.2d 597, and *Aiuppa* v. *United States*, 10 Cir., 338 F.2d 146, are reprinted as Appendices "E" and "F", respectively.

This Court granted the Petitioner's Petition for Writ of Certiorari to review the second opinion of the Court of Appeals and remanded the cause for a hearing on the effect of illegal electronic eavesdropping (*Aiuppa* v. *United States*, Oct. Term 1968, No. 124; see *Giordano* v. *United States*, 394 U.S. 310). This petition is to review the opinion of the Court of Appeals in the appeal from that hearing.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1971. (Appendix "A" and "B"). A timely Petition for Rehearing was denied on May 10, 1971 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In a criminal trial which had been transferred to a Judicial Division other than that in which the information was filed, because of prejudicial publicity, prevalent throughout the State, and where ten prospective jurors had been excused for opinion or bias obtained from publicity, may a District Judge properly refuse to interrogate

the trial jury concerning exposure to admittedly prejudicial accounts appearing in newspapers of general circulation in the State of Kansas in both days of the trial, and brought to the attention of the Court prior to the jury's retirement and deliberation?

2. In a criminal trial which had been transferred from another District in the same State because of publicity, and ten prospective jurors had been excused for opinion or bias arising from publicity, may the jurors be allowed to separate during deliberations with likely exposure to admittedly prejudicial publicity?

3. In light of *Griffin* v. *California,* 380 U.S. 609, may the Court, over specific objections, instruct the jury that a defendant cannot be "compelled" to testify, and no presumption of guilt and no inference of any kind may be drawn, from the "failure" of a defendant to testify?

STATEMENT OF THE CASE

This is the second Petition for a Writ of Certiorari in this case. While the first Petition was pending, the Solicitor General in his brief advised this Court of electronic eavesdropping, and the Petition for a Writ of Certiorari was granted and the case remanded to consider this matter which proved irrelevant on disclosure to the extent made.

The petitioner at this hearing on remand, introduced evidence, which was uncontradicted and uncontroverted by the government, concerning circulation of The Kansas City Star and The Kansas City Times in Fort Scott, Kansas, the place of trial. This evidence, offered to prevent a miscarriage of justice on an obvious mistake of fact, was not considered by the trial court on remand or the Court of Appeals on review.

This evidence showed The Kansas City Star had a daily circulation during the period of the trial of 852 copies, and The Kansas City Times had a circulation of 962 copies in Fort Scott, Kansas, the place of trial. The population of Fort Scott was 9,786 people including men, women and children.

The petitioner was convicted in a trial which lasted two days, by jury, of a third amended information containing two Counts, Count 1 charging the petitioner with unlawful possession of approximately 500 mourning doves, all but 48 of which were in excess of the legal limit in violation of Section 703, T. 16, U.S.C.; Count 2 charged the petitioner, Joseph Aiuppa, without being permitted by regulation, with the transportation of the same mourning doves, also in violation of the same statute.

This was the second trial of the defendant, the first judgment of the District Court of Kansas, after a trial without a jury, having been reversed for the error of failing to suppress evidence. *Aiuppa* v. *United States*, 10 Cir., 338 F.2d 146.)

After the remand from the first appeal (the opinion in which appears in the appendix hereto as Appendix "F" at appendix pages 21 through 25), the United States Attorney filed a third amended information on February 1, 1965. The original arrest of the petitioner occurred on October 1, 1962. After post trial motions by the defendant were denied in this second trial at Fort Scott, Kansas, the petitioner was sentenced to custody of the Attorney General for a period of three months on October 1, and was fined $500.00 on each of Counts 1 and 2, making a total of 3 months' imprisonment and $1,000 in fines, plus the costs of prosecution.

After the reversal of the first trial, where the petitioner received a similar sentence, Chief Judge Stanley of

the District of Kansas entered an order providing as follows:

> "'Now on the 2nd day of September, 1965, the defendant's motion to suppress evidence comes on for argument. After hearing arguments of counsel . . . for the defendant and being well advised in the premises, the court finds that all conversations, records, identifications, researches and evidentiary leads emanating from said search and seizure complained of be suppressed.'' (App. 72)[1]

On June 20, 1966, this cause came on for re-trial before the Hon. George Templar and a jury, at Fort Scott, Kansas. The first trial was at Kansas City, Kansas, and the motion of the petitioner for removal to another Division was granted because of the prejudicial publicity which attended the first trial, both before and during the trial.

In voir dire conducted by Judge Templar, ten of the prospective jurors were excused for cause because they said that they had read of the case in newspapers or had heard about it on radio and television, or had discussed it, and had a bias or an opinion concerning the guilt of the petitioner. These prospective jurors were excused for cause, since the petitioner had only three peremptory challenges under the Federal Rules of Criminal Procedure. (App. 95-141)

After the selection of the jury and prior to the commencement of the reception of evidence, an attorney named Menghinie advised the court and the United States Attorney that he represented a number of witnesses who had been subpoenaed by the Government who felt that under

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[1] References to "App." are to the certified Appendix prepared for the Court below.

the circumstances that they should refuse to testify as they might incriminate themselves. He further told the court that he represented a Mr. Blunk who at the time of the occurrence of the transaction, was a ward of the court and was judged incompetent and that he had a statement from the doctor stating that at the present time Mr. Blunk was not fit to testify. (App. 146-147)

The first witness for the Government, Andrew Williams (App. 151-167), was permitted to testify over the objection of the petitioner (App. 151-2), that his testimony was the result of a lead emanating from a search which had been held to be illegal. On the hearing on the motion to suppress, Alfred Robinson, a United States Game management agent, testified that it was not until after the car was searched that he knew it contained mourning doves and it was only after he obtained this information that he interviewed Williams. (App. 27)

Andrew Williams testified (App. 151-169) that from September 15 to October 1, 1962, he cleaned doves for many people and stored them at Frontenac, Kansas in the ice box at a Dairy Queen. He was paid by a man named Harold MacMurray for cleaning doves and he imagined that Mr. Aiuppa had paid him because he was keeping his dog. He kept Mr. Aiuppa's dog for four months and he paid him $150.00, on October 1, 1962. On approximately October 1, 1962 at the request of the petitioner, Williams obtained some dry ice at the ice plant at Pittsburg, Kansas and took it to the Dairy Queen in Frontenac where he broke it into small pieces, and put the ice on top of coolers. He further testified that he put dry ice on top of the cartons and that there were packages in the cartons but that he had never seen the packages opened. He testified that he placed the mourning doves in a sack or plastic bag. He

further testified that he cleaned somewhere between 900 and 1400 doves. He also testified that he prepared a plastic bag full of giblets for the petitioner and that after placing the bag in the freezer at the Dairy Queen it was broken and Mr. Aiuppa requested another bag. He further testified that there were cartons that were filled with plastic bags and he placed ice on top of these cartons and he placed one of the cartons in the automobile of the petitioner, but he did not know how many birds were in the carton (App.. 161) and he could only assume that other cartons were placed in the Cadillac. The witness did not know how many birds were in the containers but he assumed that there were four or five hundred (App. 164-165).

Mr. Williams testified that Agent Robinson and another agent first contacted him about this case the day after Mr. Aiuppa had left for Chicago and that he had never discussed this matter with them or any one else representing the Government prior to that day. (App. 166-167). He further stated that he cleaned and placed somewhere between 900 and 1400 birds in the ice box at the Dairy Queen, but he did not know how many remained the morning he went over to the Dairy Queen when Mr. Aiuppa was leaving for Chicago but that there were many people who had access to the birds including a Mr. MacMurry who had removed some birds from the cooler. He did not count any of the birds which he placed in the car of the petitioner and he did not know how many there were remaining in the freezer after he had driven away. He also testified that doves were hunted by large number of persons and frequently they were cleaned and stored and were used for "game feeds" at which many people would attend. (App. 168-169).

Also, during the questioning of this witness by the attorney for the Government, after the witness had been unable to give definite answers to questions by the attorney for the Government, the following occurred:

Q. Who told you to have a faulty memory?

A. Nobody told me to have a faulty memory.

Mr. Walsh: Object, and move to strike it. I ask the jury be instructed not—to disregard that question and answer.

The Court: Sustained, the jury will disregard it.

On the first trial, the prosecutor had the benefit of Williams' testimony, but also that of the agents who conducted the illegal search and seizure, and the evidence of an ornithologist who established the subject birds as mourning doves, subject to the migratory bird treaties and Acts.

In the second trial, the only evidence offered on these subjects was that of Andrew Williams, because of course, all of the other evidence was suppressed.

Williams testified to his being taken to the United States Commissioner and there charged with a violation of the Migratory Bird Act, and receiving a fine of $50.00 and giving statements to the Game Wardens—all after Aiuppa's arrest and the illegal search and seizure had confirmed the Warden's suspicion that Aiuppa possessed and transported mourning doves.

During the trial of the case, Mr. Blunk was called to testify (App. 175) over the objection of the petitioner (App. 174). He refused to answer questions on the grounds that he feared his testimony might tend to incriminate him.

Hugo Farabi also was called to testify (App. 181-2), and he exercised his privilege against self-incrimination. He

further stated that he had advised the prosecutor, through his counsel, prior to being called to testify, that he intended to claim his privilege (App. 181-2).

At the conclusion of the Government's case, the defendant moved for a mistrial based on the ground that he was unduly prejudiced by the prosecutor's action in calling Mr. Farabi and Mr. Blunk to the witness stand when he knew and had been informed by their counsel, that they intended to take the privilege granted to them under the Fifth Amendment of the Constitution of the United States (App. 197).

Petitioner further moved for judgment of acquittal at the end of the Government's evidence (App. 197); prior to ruling on the motion for judgment of acquittal, the court stated that it was having difficulty with reconciling the number of doves that were in the possession of Mr. Aiuppa from the evidence, and the court stated further that it seemed somewhat speculative from the evidence as to the number of doves in his possession, but overruled the motion (App. 200-202). The petitioner then rested (App. 201-202). During the conference on instructions, the petitioner objected to the giving of court's instruction 16 (App. 88-210) on the basis that the manner in which the instruction was phrased that "the law does not compel a defendant in a criminal case to take the witness stand and testify" was prejudicial comment on the failure of the petitioner to testify and also implied that although he could not be compelled to testify, his testimony would be desirable. The petitioner further objected to giving any instruction on the failure of the petitioner to testify in his own behalf (App. 210-211).

The petitioner then moved for a mistrial based upon two newspaper articles, petitioner's Exhibits "A" and "B"

(App. 280-283). The petitioner further moved in lieu of granting a mistrial on the basis of the publicity that the court query the jurors individually and separately out of the presence of the others concerning what they knew about these articles, and what they knew about other specific articles, and whether they had ever heard Mr. Aiuppa described as a gangland or syndicate hoodlum (App. 215-216). The court relied upon a presumption that the jurors would do their duty and refused to conduct any voir dire examination (App. 216). The case was argued and submitted to the jury, and the jurors were allowed to separate during their deliberations. When they separated, no admonition of any kind was given to them concerning exposure to publicity. They were told only that they were not to talk about the case (App. 242-243). The jury returned a verdict of guilty (App. 88). A timely motion for acquittal notwithstanding the verdict or in the alternative for a new trial was filed on July 7, 1966 (App. 89). This motion was denied on August 19, 1966 (App. 91). On August 19, 1966, the petitioner was sentenced to the custody of the Attorney General for a period of three months on Count One and was fined $500.00 on each of Counts One and Two for a total fine of $1,000.00, and further assessed the cost of prosecution. A timely notice of appeal was filed (App. 93). On appeal the Court below affirmed the judgment of the District Court. Aiuppa v. United States, 10 Cir. 393 F.2d 597 (Appendix "E" at appendix pages 10 through 20).

After this Court's grant of a Writ of Certiorari (*Giordano* v. *United States,* 394 U.S. 310), the cause was remanded for a hearing on the effect of certain illegal eavesdropping admitted to exist by the Solicitor General. The eavesdropping, to extent disclosure was made, proved to be irrelevant.

However, at the hearing, additional evidence was offered as to the circulation figures of the admittedly prejudicial newspaper articles.

On appeal from this hearing, the Court of Appeals again affirmed the petitioner's conviction. (Appendix "A"). The Court of Appeals then denied a Petition for Rehearing (Appendix "C") and a motion for stay of mandate.

REASONS FOR GRANTING THE WRIT

This case presents a direct and substantial conflict, which should be resolved, between the decisions of this Court and the Court of Appeals below; and conflict between the Court of Appeals below and the decisions of other Courts of Appeal, on the necessity for inquiry of petit jurors by the trial judge when probability of exposure of the jury to "prejudicial" publicity appears.

There is also a direct conflict between the Court of Appeals below and the Court of Appeals for the Seventh Circuit on whether a jury in a criminal case should separate after beginning to deliberate and before verdict. This separation was, of course, more dangerous because of possible exposure to news articles and headlines which the Court of Appeals called "prejudicial".

The decision below is also in conflict with the American Bar Association Standards for Fair Trial and Free Press. (See Section 3.5(f) of Recommendations, (Tentative Draft page 13)).

1. The decision of the Court below relating to the duty of the District Judge to conduct an inquiry of the jurors when newspaper articles, which are admittedly prejudicial, appear is in conflict with the decisions of this Court in *Janko* v. *United States*, 366 U.S. 716, *Sheppard* v. *Maxwell*, 384 U.S. 333, the Seventh Circuit in *United States* v. *Palermo*, 410 F.2d 468, *United States* v. *Accardo*, 298 F.2d 133 and *United States* v. *Largo*, 346 F.2d 253; the District of Columbia in *Coppedge* v. *United States*, 272 F.2d 504, the Fifth Circuit in *Henslee* v. *United States*, 246 F.2d 190 and the Sixth Circuit in *Marson* v. *United States*,

203 F.2d 904. The trial of this case, which had been transferred to Fort Scott, Kansas because of prejudicial publicity consumed a period of two days. In the selection of the jury, ten prospective veniremen were excused because they had formed opinions based upon their exposure to publicity. At the conclusion of the evidence, counsel for petitioner brought to the attention of the court two newspaper articles which had appeared in the Kansas City newspapers, which were purchased by counsel for the petitioner, on the streets of Fort Scott, Kansas. These articles (App. 280-283) referred to the petitioner as a "gangland figure" and related that his prior conviction for this offense had been reversed by the United States Court of Appeals for the Tenth Circuit because of an illegal search and seizure. Defendant's Exhibit "A" also reported that the United States Attorney indicated that he had in his possession evidence sufficient to convict. The second article (Exhibit "B") again referred to the petitioner as "gangland figure" and again related that the petitioner had been convicted on these charges in a prior trial but the conviction had been reversed because of an illegal search and seizure. This article also erroneously reported that the District Judge had asked the witness Williams, "Who told you to have a faulty memory?"

When these articles were called to the attention of the District Judge (App. 214-217), there was no contention made that these newspapers were not newspapers of general circulation in the State of Kansas, nor was there any contention made by the Government, and we do not anticipate any such contention here, that these newspapers were not available in Fort Scott, Kansas. At the hearing in remand, in fact, it was shown that The Kansas City Star had a daily circulation of 852 and the Kansas City Times had a daily circulation of 962 in Fort Scott, the place of

trial, a city of 9786. The Court, however, refused to interrogate the jurors concerning their exposure to these articles as requested by the petitioner and based his refusal on the reasoning that to so interrogate at this time would be prejudicial to both the Government and the defendant (App. 216).

The Court of Appeals made an affirmative finding that the articles were in fact prejudicial (Appendix E, *infra*, p. 20) but found no error in the failure of the District Court to conduct an inquiry of the jurors to determine their exposure to these articles.

We submit that this decision is in direct conflict with the decision of this Court in *Janko* v. *United States*, 366 U.S. 716 where this Court, based upon a confession of error by the Solicitor General, reversed a conviction on facts strikingly similar to the case of the petitioner. The trial of *Janko* lasted two days. During that two-day period, prejudicial articles appeared in the press describing Janko as a "former convict" and stating that he had been convicted of the same offense but was granted a new trial. The District Judge did not conduct an inquiry of the jurors. In confessing that this procedure was in error, the Solicitor General stated:

> "The nature of the newspaper article in question, especially in its reference to the outcome of the prior trial and to petitioner as a 'former convict' and a 'former employee of East Side rackets boss Frank (Buster) Wortman'—a recipient of considerable adverse publicity in the St. Louis press—was such as to raise substantial doubt as to whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall* v. *United States*, 360 U.S. 310.
>
> "In the light of the character of the extraneous information contained in the article, we think that, be-

> fore the jury was finally discharged, the trial court should have assured itself as to whether the jurors had in fact read the article"

The procedure suggested by the Solicitor General is followed in the Seventh Circuit, *United States* v. *Palermo*, 410 F.2d 468; *United States* v. *Accardo*, 298 F.2d 133 and *United States* v. *Largo*, 346 F.2d 253; the District of Columbia, *Coppedge* v. *United States*, 272 F.2d 504, the Fifth Circuit, *Henslee* v. *United States*, 246 F.2d 190 and the Sixth Circuit, *Marson* v. *United States*, 203 F.2d 904.

Therefore, this Court should issue its Writ of Certiorari to resolve this important question in the administration of criminal justice relating to the duty of District Judges to ascertain the effect of prejudicial publicity upon jurors.

2. The decision of the Tenth Circuit relating to the separation of jurors during deliberations is in direct conflict with the decision of the Seventh Circuit in *United States* v. *D'Antonio*, 342 F.2d 667 (7th Cir. 1965) and *United States* v. *Panczko*, 353 F.2d 676 (7th Cir. 1966).

In *D'Antonio*, with no showing of actual prejudice, the Seventh Circuit held:

> At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion.

In *Panczko*, the Seventh Circuit reiterated the decision in *D'Antonio*, even though the jury had been instructed not to read anything or listen to anything about the case or discuss it with anyone. 353 F.2d 676, 677, 678.

In this case, although direct reliance was placed on *D'Antonio,* and *Panczko* by the petitioner, the Tenth Circuit, without mentioning these decisions, refused to find prejudice in the separation. In so doing the Court stated that the trial court properly admonished the jury in regard to their conduct during separation. (Appendix E, *infra,* p. 20) An examination of the record however fails to disclose the admonition. The Court only told the jurors not to discuss the case during the luncheon recess. Nothing was said about exposure to publicity. (App. 242-243).

Because of the conflict within the circuits concerning the propriety of separation of jurors during deliberation in criminal cases, this Court should issue its Writ of Certiorari.

3. This court in *Griffin* v. *California,* 380 U.S. 609, held that it was a violation of a defendant's privilege against self-incrimination to allow comment by the Court and prosecutor concerning the failure of a defendant to testify, and in *Chapman* v. *California,* 386 U.S. 18, this Court held that such comment was reversible error unless it was established beyond a reasonable doubt that such a violation of the Fifth Amendment was harmless error. In the case at bar the petitioner did not elect to become a witness in his own behalf. Over the objection of the defendant, the Court instructed the jury that the petitioner could not be "compelled" to testify. Although this instruction does not allow the failure to elect to testify to be considered as affirmative evidence of guilt, by its very terms it implies that an innocent defendant would testify and as such is violative of the principles enunciated in *Griffin.* Further, the petitioner objected to the giving of any instruction relating to his failure to elect to become a witness in his own behalf. We submit that this Court

should issue its Writ of Certiorari to settle the question whether an instruction relating that a defendant cannot be "compelled" to testify and "failure" to testify constitutes a prejudicial comment upon the decision of a defendant not to testify when he expressly objects to any charge on the subject whatsoever, and thereby impinges upon the defendant's Fifth Amendment rights. (c.f. 18 U.S.C. 3481)

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 26, 1971

APPENDIX "A"

(Filed Mar. 31, 1971)

(Filed May 20, 1971)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM, 1971

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 363-70
JOSEPH AIUPPA, *Defendant-Appellant.*	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. W-CR-390)

E. Edward Johnson, Assistant United States Attorney (Robert J. Roth, United States Attorney, on the brief) for Plaintiff-Appellee.

Maurice J. Walsh (Carl M. Walsh, and Joseph J. Poizner, Of counsel, on the brief) for Defendant-Appellant.

Before BREITENSTEIN and HILL, Circuit Judges, and LANGLEY, District Judge.

BREITENSTEIN, Circuit Judge.

The case is here for the third time. Defendant Aiuppa was charged by information with the possession and trans-

portation of over 500 mourning doves on October 1, 1962, in violation of 16 U.S.C. § 703. We reversed his first conviction because evidence was received of an unlawful search and seizure. Aiuppa v. United States, 10 Cir., 338 F.2d 146. On retrial, the objectional evidence was excluded and the jury again found him guilty. The court sentenced him to three months imprisonment and fined him $500 on the first count (possession). On the second count (transportation) a $500 fine was imposed. We affirmed the conviction. Aiuppa v. United States, 10 Cir., 393 F.2d 597.

It appears from the uncontroverted statement of counsel in the record that in response to the petition for certiorari to review our last mentioned decision, the Solicitor General informed the Court that:

> "We have the duty however to advise the Court that on December 5, 1961, prior to the commission of the offense involved herein, the Petitioner was overheard by an electronic device installed by trespass in a commercial establishment."

The Supreme Court granted certiorari, vacated our judgment, and remanded the case to the district court for further proceedings in conformity with Alderman v. United States, Ivanov v. United States, and Butenko v. United States, 394 U.S. 165. See Giordano v. United States, 394 U.S. 310, which disposed of a number of cases including Aiuppa v. United States.

On remand the defendant filed a motion for production of material relating to electronic surveillance. The court held a hearing and among other things ordered defendant to file a list of places where he thought such surveillance might have occurred. He did so. The government responded with an affidavit of the Director of the Bureau

of Sport Fisheries and Wildlife stating that the defendant "was not directly covered by electronic surveillance and furthermore that none of his conversations were monitored by electronic surveillance devices" used by bureau agents. The written response of the United States Attorney stated that the United States Department of Justice including the Federal Bureau of Ivestigation had not conducted any surveillance of the defendant, his premises, his agents, or his employees since December 5, 1961, and that no surveillance had been conducted by the United States Treasury Department.

The government filed and furnished to defense counsel a log or transcript of a conversation in which defendant participated and which took place in the Armory Lounge, Forest Park, Illinois, on December 5, 1961. The United States Attorney said "that the log furnished is the only such record of any such surveillance or monitoring made by or in the possession of any government agency." The log is a part of the record and is described by defense counsel in their brief as "apparently innocuous insofar as this prosecution is concerned."

The court conducted a hearing at which no evidence pertaining to surveillance was offered or received. Thereafter it made findings of fact and conclusions of law and held that all materials as to which the defendant had any standing to object had been furnished him; that no evidence adduced at the trial stemmed from electronic surveillance; that the conviction of the defendant was in no way tainted by such surveillance; that all government evidence "had an origin independent from any electronic surveillance"; and that there was "no relevancy in any of the material from the electronic surveillance log to any evidence offered at the trial of the defendant's case."

We agree with the trial court. A review of the transcript of the trial and of the proceedings on remand convinces us that the conviction of the defendant was not tainted by any electronic surveillance. The record of the December 5, 1961, conversation in an Illinois lounge has no relevance to any violation of the migratory bird laws some ten months later in Kansas.

The defendant now argues that the remand order was not satisfied because the government made no attempt to support by evidence the statements made in the government's response to the motion to produce. He says that the full extent of the electronic eavesdropping cannot be known without evidence of the source, or the disposition of the original or other records of the material. We believe that the district court correctly interpreted and applied the rationale of Alderman and Giordano. The government conceded the Fourth Amendment violation and the only question was the relevancy of the material obtained. After a disclosure by the government, an examination of that material by the defense, and an adversary hearing, the court held that the material was not relevant to, and did not taint, the trial. In the circumstances we see no reason for the defense to be given an opportunity to cross-examine the agents who made the tapes or the custodians thereof, or to inspect the original tapes. The trial court was convinced, and we are also, of the competence and trustworthiness of the government's response and disclosure.

Our decision in United States v. Alderisio, 10 Cir., 424 F.2d 20, is not contrary to the views expressed herein. In that case there was surveillance before and during the trial. Defense counsel were furnished logs and airtels. An airtel is an interoffice memorandum compiled from original

tapes. The airtels showed conversations not noted in the corresponding logs. We remanded for the trial court to check the completeness of the logs against the airtels. In the case at bar nothing indicates any logs or airtels which were not furnished to defense counsel. The single monitored conversation took place many months before the trial.

United States v. Schipani, 2 Cir., 362 F.2d 825, reversed 385 U.S. 372, is not in point. That was a prosecution under the internal revenue laws and a screening of certain materials under the Jencks Act, 18 U.S.C. § 3500. In camera proceedings were held by the trial court with the prosecutor, but not defense counsel, present. The court of appeals criticized the procedure but found no prejudice to the defendant. The Supreme Court summarily reversed. In the case at bar the court made no in camera inspection. The log of the conversation was turned over to defense counsel and an adversary hearing was held thereafter.

In affirming the conviction of Aiuppa after the second trial we rejected the claim that the jury was influenced by newspaper publicity unfavorable to the defendant. Aiuppa v. United States, 10 Cir., 393 F.2d 597, 603-604. That trial took place in Fort Scott, Kansas, and the claimed adverse articles were in Kansas City newspapers. At the second hearing on remand, defendant counsel made an oral motion for new trial on the basis that, in considering the prejudicial publicity issue, both the trial and appellate courts were misled by lack of knowledge of the circulation of the Kansas City papers in the Fort Scott area. An offer was made of an unauthenticated statement of the circulation of two Kansas City newspapers in Fort Scott and Bourbon County, Kansas. The court rejected the offer and denied the motion for new trial.

We decline to review the matter again. United States v. Scardino, 5 Cir., 414 F.2d 925, is not in point. We have here no supervening change in fact or law. That is not a case of newly discovered evidence. No showing is made that the facts as to newspaper circulation in the area were unavailable at the time of the trial. We adhere to our statement that "there is nothing in the record to indicate that the jurors were exposed to the newspaper articles in question." 393 F.2d 604.

Affirmed.

APPENDIX "B"

(Filed May 20, 1971)

MARCH TERM—MARCH 31, 1971

Before Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges; and Honorable Edwin Langley, District Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee;*	)	
v.	)	No. 363-70
JOSEPH AIUPPA, *Defendant-Appellant.*	)	

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that JOSEPH AIUPPA, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

HOWARD K. PHILLIPS, Clerk
By *Helen R. Bartha*
Deputy Clerk.

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit
By
Helen R. Bartha
Deputy Clerk

APPENDIX "C"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
Denver, Colorado 80202
May 10, 1971

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Kansas City, Kansas 66101

Mr. Robert J. Roth, U. S. Attorney
Mr. E. Edward Johnson, Asst. U. S. Attorney
P.O. Box 1537
Topeka, Kansas 66601

Re: No. 363-70
U.S.A. v. Joseph Aiuppa

Gentlemen:

An order has been entered today denying the petition for rehearing filed in the captioned case.

Yours very truly,

Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

amc

APPENDIX "D"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
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May 18, 1971

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Mr. E. Edward Johnson
Asst. U. S. Attorney
P.O. Box 1537
Topeka, Kansas 66601

Re: No. 363-70
U.S.A. v. Joseph Aiuppa

Gentlemen:

An order has been entered today denying the appellant's motion for stay of mandate in the captioned case.

There is no showing as required by our rule adopted on November 18, 1970, and amended on March 22, 1971, that the petition for certiorari is not frivolous and is not filed merely for delay.

From a consideration of the record, the Court believes that the petition is frivolous and is filed for delay.

Yours very truly,
Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

amc

APPENDIX "E"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM 1968

JOSEPH AIUPPA, *Appellant,*	)	
vs.	)	No. 9243
UNITED STATES OF AMERICA, *Appellee.*	)	

(Reported at 393 F.2d 597)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Maurice J. Walsh (John Powers Crowley with him on brief) for Appellant.

Newell A. George for Appellee.

Before MURRAH, Chief Judge, LEWIS, Circuit Judge, and CHRISTENSEN, District Judge.

MURRAH, Chief Judge—

On first appeal from a jury-waived trial and conviction for unlawful possession and transportation of migratory

birds, 16 U.S.C. §703, we remanded this case for a new trial with directions to suppress, as evidence, contraband [560 frozen mourning doves] seized as the fruits of an unlawful search. Aiuppa v. United States, 338 F.2d 146. On this appeal from a jury conviction and sentence on the same counts Aiuppa asserts numerous other grounds for reversal. After careful consideration of each point raised, we affirm the judgment.

Aiuppa first contends here that the Government should have been required to elect between Counts I and II of the Information. The argument is to the effect that since Count I charged possession of the birds and Count II charged transportation, and since it is necessary to have possession in order to transport, the two counts are necessarily merged. Little need be said concerning this contention, for it is conceded, as indeed it must be, that where the same act or transaction constitutes a violation of two distinct statutory provisions, the traditional test of identity of offenses is whether the same evidence is required to sustain them. See Rawls v. United States, 162 F.2d 798; Beacham v. United States, 218 F.2d 528, and cases cited; Robinson v. United States, 366 F.2d 575. We think the charges here were sufficiently separate and distinct. Under Count I proof was required to show that Aiuppa had in his possession migratory birds in excess of the number allowed by statute (24 per person). Under Count II it was necessary to prove that he did some act in furtherance of the transportation of such birds. Moreover, no where in the record before us can we find where the appellant raised such an objection at trial.

Objection is next raised to the testimony of the Government's witness, Andrew Williams, on the grounds that such testimony was the result of an investigative lead obtained

from the illegal search. It is argued that Williams was not interviewed by the Government until after the illegal search and that the Government failed to sustain the burden of establishing that the lead did not emanate from that search. Suffice it to say that the record clearly reflects that prior to the illegal search the Government received information from an informer to the effect that Aiuppa had been hunting in the Frontenac-Pittsburg, Kansas, area with well-known people; that "they had killed an enormous amount of doves" and that Williams was cleaning the doves, packaging them and placing them in cold storage. Since knowledge of these facts was gained prior to and independently from the illegal search, they may be proved like any other facts. See Wong Sun v. United States, 371 U.S. 471; Silverthorne v. United States, 251 U.S. 385. Such independently gained information does not become tainted merely because the same information is subsequently discovered during an illegal search. See Burke v. United States, 328 F.2d 399.

It is also urged that even considering the testimony of Andrew Williams, the evidence was insufficient to prove that Aiuppa either possessed or transported mourning doves in excess of the statutory limit [24 per person or a total of 48 for Aiuppa and his wife]. The argument is that there was no direct testimony that the birds in question were mourning doves protected under the provisions of §703 and that the only testimony as to how many birds were placed in Aiuppa's automobile consisted solely of assumptions and guesses.

Many times we have said that in determining the sufficiency of the evidence to support a jury verdict, we are constrained to view the evidence in the light most favorable to the Government and to examine such evidence only to

determine whether the jury was justified in finding beyond a reasonable doubt that the defendant was guilty of the offense charged. See Elbel v. United States, 364 F.2d 127; VanNattan v. United States, 357 F.2d 161; Reed v. United States, 377 F.2d 891. And, it is equally important to bear in mind that in so viewing the evidence it is not our function to determine the weight of the evidence or assess the credibility of the witnesses. See Lucas v. United States, 355 F.2d 245, and cases cited. Applying these rules, we cannot say the evidence here did not support the verdict. Andrew Williams testified that during approximately a two-week period he cleaned between nine and fourteen hundred mourning or turtle doves and placed them in plastic bags for various hunters, including Aiuppa, in the Frontenac-Pittsburg, Kansas, area; that these doves were then placed in cold storage in the Dairy Land Freezer in Frontenac; that he placed approximately ten doves in each plastic bag and then filled "ordinary freezers" with the plastic bags. Without giving linear dimensions Andrews indicated by hand motions to the jury the approximate size of the freezers or cartons in which the bags of doves were placed.[1] He also testified that he placed one of these cartons in the rear of Aiuppa's car and thereafter saw where three others had been placed in the rear of the car; that Mr. and Mrs. Aiuppa were sitting in the car and that he (Williams) directed them as to the best way to "get out of town to Missouri". By way of identifying the contraband game, Mrs. Williams testified that she assisted her husband on at least one occasion in cleaning some mourning or turtle doves. Ronald Tims also testified that he assisted Mr. Williams in cleaning turtle doves. From all of this evidence we think the jury

[1] We think it can safely be assumed that each "freezer" held more than one plastic bag of ten doves.

was justified in finding that Aiuppa possessed and transported more than 48 mourning doves in violation of §703.

Complaint is next made of the prosecutor's commenting on the memory of witness Williams and calling as witnesses two other persons who had previously informed him they would refuse to testify. During the trial, while Government witness Williams was testifying on direct examination and having difficulty recalling specific details, the prosecutor asked him, "Who told you to have a faulty memory?" Aiuppa's counsel immediately objected and upon motion the Court ordered the testimony stricken and directed the jury to disregard it.

We agree with appellant that the statement by the prosecutor was unnecessary and improper. But, every slight excess of the prosecutor does not require that a verdict be overturned and a new trial ordered. United States v. Borda, 285 F.2d 405. And, such an error can generally be cured, as indeed it was here, without harmful effect upon a defendant by the trial court's striking the testimony or comment and admonishing the jury to disregard it. Lawrence v. United States, 357 F.2d 434; Drew v. Lawrimore, 380 F.2d 477, and cases cited; and see Singer v. United States, 380 U.S. 24, 38.

As to the allegation that the Government prejudicially called two witnesses who had advised the court they would invoke the protection of the Fifth Amendment and refuse to testify, both sides rely upon United States v. Compton, (CA 6), 365 F.2d 1, 5, wherein the court stated:

> "Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privelege and will not testify. However, to call such a witness, counsel must have an honest belief that the wit-

> ness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence."

It is argued that there was no showing by the Government that either of these witnesses had information pertinent to the issues in the case, and that the only purpose for calling them was to get them to claim privilege before the jury, leaving the inference they were hiding something.

The record indicates that a Kansas attorney appeared during the trial and informed the court that he represented "a number of witnesses who feel that they should, under the circumstances, refuse to testify as they might incriminate themselves." No where can we find where the "number of clients" were identified by name or that these two witnesses were identified as being among those represented by the attorney. Moreover, both of these witnesses had testified in the first trial and in this trial were asked only a few pertinent questions, such as whether they had hunted with the accused. Immediately upon claiming the privilege of the Fifth Amendment, each was excused from further testifying. We cannot say that the Government did not honestly believe the witnesses had pertinent information not that under the circumstances it was prejudicial to attempt to elicit such information from them.

The next allegation of error is directed at the court's permitting two government agents each to testify to the effect that he is employed by the Department of Interior and is custodian of the records in his respective region; that he had searched the records in his region and could

find no record of an application or permit for Aiuppa to possess more than the statutory limit of mourning doves. The argument is to the effect that the best evidence would have been the records themselves and that failure of the witnesses to produce the records from which they made their search deprived Aiuppa of his constitutional right to cross-examine witnesses against him. Reliance is placed upon United States v. Rohalla (CA7), 369 F.2d 220, wherein the court held it was prejudicial error to permit a F.B.I. agent to testify that he had examined a license registration book published by the Secretary of State's office and had determined that a certain license number was issued to the defendant, Rohalla. The court in that case reasoned that "'There was no way that defense counsel could by cross-examination of agent Williams effectively challenge the authenticity or accuracy of a book that was not produced in court." Id. 224. But, we think that case is easily distinguished from ours. In Rohalla the Government was attempting to prove an entry in an official book, but the agent testifying did not purport to be the official custodian of the records he had examined. And, the court was careful to note that "The book which should have been produced in open court was available to the government and was at that time in the same building where the trial was being conducted." In our case the Government was attempting to prove the absence of an entry in an official set of records by the testimony of the official custodians. Rule 27 F.R.Cr.P. and Rule 44(b) F.R.C.P. specifically provide that "A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement * * * is admissible as evidence that the records contain no such record or entry." And, Rule 44(c) provides that "This rule does not prevent the proof of * * * lack of entry therein by any

other method authorized by law." Thus, "to establish the fact that there is no record as to a particular matter or thing, parol evidence may be given." Jackson v. United States, 250 F.2d 897, and authorities cited. We can, therefore, see no error in allowing the Government to negate the issuance of a permit to Aiuppa without producing the records. And, see also dissent in United States v. Rohalla, supra.

Aiuppa next urges that it was prejudicial error for the trial court to instruct the jury that

> "The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a *defendant* to testify.
>
> "The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand."

It is argued that the language of the instruction amounts to a prejudicial comment on the failure of a defendant to take the stand, prohibited in Griffin v. California, 380 U.S. 609.[2] But, we cannot agree. We know, of course, that such an instruction must be given if requested, i.e. see United States v. Schabert, 362 F.2d 369, and cases cited.

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[2] In Griffin the court was concerned with the California "Comment Statute" which provided that a defendant's failure "to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The Supreme Court held that this violated the Fifth Amendment prohibition against self-incrimination.

While it may be the better practice not to charge on this subject unless specifically requested by a non-testifying defendant, it is not reversible error to do so. Id. 372. When couched in such careful terms as used here, we do not think the charge can be said to be more than "a faithful compliance with the 'implied direction' given district judges by Congress to fulfill 'their traditional duty in guiding the jury by indicating the consideration relevant to the latter's verdict on the facts.'" Coleman v. United States, 367 F.2d 388, citing and quoting from Bruno v. United States, 308 U.S. 287, 293. See also United States v. Tannuzzo, 174 F.2d 177; Affronti v. United States, 145 F.2d 3.

Lastly, Aiuppa contends that it was error for the trial court to refuse to grant a mistrial based upon prejudicial newspaper publicity, or, in the alternative, to at least voir dire the jurors whether they had read the newspaper publicity and were prejudiced thereby. He further argues that it was error for the court to permit the jury to separate for lunch during their deliberations and prior to the verdict so as to expose them to the prejudicial publicity and other possible influencing factors.

At the conclusion of all the evidence, and before the jury had been instructed, Aiuppa's counsel moved for mistrial on the grounds that the jury could not "reasonably give us a fair trial" due to two current newspaper stories. One of these stories was published on the first day of trial in the Kansas City Star and was headlined on page 4: "Jury Selected in Aiuppa Case. Chicagoan's Trial in U.S. District Court in Fort Scott Kansas." A subheadline read "Gangland Figure Found Guilty in 1963 but Won Appeal". The article went on to discuss Aiuppa's first trial, conviction and sentence and the suppression by this court of "more than 500 doves" found "in the trunk of the Aiuppa Cadillac." The second article was published on the second

day of trial in the Kansas City Times and was headlined, "Two Freeze Up in Aiuppa Case; Government Witnesses Refuse to Answer in Second Trial. Now Vague on Details". A subheadline erroneously read, "Judge Asks One 'Who Told You' to Forget Answers?" This article then recited various occurrences at the trial.

Judge Templar noted that "this has always been a problem for the trial courts, and under the provisions of the First Amendment I know of no way that this court can prevent an irresponsible newspaperman from publishing anything he wishes to publish * * *. This is apparently presenting some very serious problems for the courts * * *." But, he determined that "in order to grant a mis-trial in this case [the Court] would have to assume that the jurors have read this article and that it had left an impression and they believed what they read and took it into consideration. Now, the Court is specifically instructing them not to do this, and the Court feels that to grant your request [for voir dire of the jury] will not be proper. In fact it would have just the opposite effect in the establishment of a fair trial because it would then call to their attention something that may not have arrived at their attention." Thereafter, the court instructed the jury to the effect that "you are to disregard any information about this case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts related to this case, I want to caution you particularly that you are to put any such information entirely out of your consideration of this case and you are to confine your consideration solely to the evidence adduced in this trial."

Each case relating to a claim of jury prejudice based on newspaper articles appearing during a trial must turn on its own special facts. See Marshall v. United States,

360 U.S. 310, 312. We have very recently considered the general problems confronting and principles applicable to the majority of cases of this type concluding that "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial." Mares v. United States, Aug. 15, 1967, 10 CA, ... F.2d ..... We cannot say, from the facts in this case, that the published newspaper stores deprived Aiuppa of a fair trial. The stories were, to be sure, prejudicial. But, they were published in newspapers at least 100 miles from the scene of the trial. And, there is nothing in the record to indicate that they were generally circulated, or for that matter circulated at all, in the vicinity of the trial or that the jurors would likely be exposed to them outside of deliberately seeking them out. We will not presume either exposure or prejudice, i.e. see Welch v. United States, 371 F.2d 287, nor will we, in a case like this, impute to a jury a disregard of its duty to confine its verdict to the evidence adduced at the trial. And see Mares v. United States, supra. We think the trial judge took reasonably precautionary steps under the circumstances by instructing the jury to disregard any such publicity it might encounter.

As to whether the jury should have been alleged to separate for lunch, we have said that "sequestration imposes a hardship on jurors and should be ordered only in unusual cases." Mares v. United States, supra. As we have seen, there is nothing in the record to indicate that the jurors were exposed to the newspaper articles in question. And, we will not presume prejudice from such a separation where, as here, the trial court properly admonished the jury in regard to their conduct during separation. See Roth v. United States, 339 F.2d 863; and see Hines v. United States, 365 F.2d 649.

The judgment is affirmed.

APPENDIX "F"

JOSEPH AIUPPA, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

No. 7560.

United States Court of Appeals, Tenth Circuit

November 9, 1964

(Reported at 338 F.2d 146)

Maurice J. Walsh, Chicago, Ill., for appellant.
Newell A. George, U. S. Atty., for appellee.

Before MURRAH, Chief Judge, and HILL and SETH, Circuit Judges.

MURRAH, Chief Judge:

This is an appeal from a conviction and sentence by the Court, a jury having been waived, on a two-count Information charging the appellant with unlawful possession and transportation of migratory birds (mourning doves), in violation of 16 U.S.C. § 703.[1]

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[1] 16 U.S.C. § 703 provides: "Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for
(Footnote 1 continued)

On pre-trial the appellant moved, pursuant to Rule 41(e), F.R.Crim.P. that the seized property "to-wit, approximately 560 frozen birds * * * be returned to him and that said property be suppressed for use as evidence," on the ground that "[s]aid unlawful search and seizure was made in the nighttime from an automobile belonging to the [appellant] and located upon the premises * * * which constitute his home, and the seizure was against his will and without a search warrant."

Pursuant to a hearing on the motion to suppress, the trial Court specifically found " * * * there was a search of [appellant's] effects, the automobile"; that "there was no consent to the search of the automobile, either voluntary or otherwise"; that "the search was not incident to a lawful arrest"; and "there was a seizure." The Court then observed that the only question on the motion to suppress was "whether there was probable cause for this search." The Government agreed, and the search and seizure was finally sustained and the seized doves admitted in evidence against the appellant, on the ground that the Agents had probable cause for the search without a warrant.

The search and seizure of the mourning doves was conducted by Federal Game Management Agents acting

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(Footnote 1 continued)
transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg, of any such birds, including in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."

under authority of 16 U.S.C. § 706,[2] which pertinently provides that such Agents " * * * shall have power, without warrant, to arrest any person committing a violation of said sections [16 U.S.C. §§ 703-711] in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; * * * and shall have authority, with a search warrant, to search any place." The statute also authorizes judges and commissioners " * * * upon proper oath or affirmation showing probable cause [to], issue warrants in all such cases."

On appeal the Government seems to admit, as indeed it must, that the Agents were acting solely under authority

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[2] On trial, one of the Government Agents testified as follows:

"Q. [By defense counsel] Now, are you—that is the total of your authority as an officer, isn't it, you are a game management officer for the government? A. Yes, sir.

"Q. You don't hold any commission or office as any other type of enforcement officer? A. No, sir.

"Q. Or civil officer? A. No, sir.

Q. And you know, do you not, that these offenses you were investigating were misdemeanors? A. I know that, sir.

"Q. And are you familiar with Section 706 of Title 16 of the United States Code?

* * * * *

"A. Yes, I am familiar with this section.

"Q. And that section outlines your authority in connection with the migratory game bird treaties and laws under it?

"A. Yes, sir.

"Q. And did you have in mind at the time that you made this search, this arrest and search, that you should have authority with a search warrant to search any place? A. No, sir.

"Q. You didn't have a search warrant of course?

"A. No, sir."

of § 706, supra. It does not contend that the search was made as an incident to a lawful arrest or under authority of a search warrant. In these circumstances, we do not have the question of the power and authority of a private person to search and seize as an incident to a lawful arrest as in Wion v. United States (10 C.A.), 325 F.2d 420. Nor, do we have the question of the authority of the Agents to seize and then search a vehicle for contraband, as in Sirimarco v. United States (10 CA), 315 F.2d 699. The Government seeks to sustain the search and seizure solely on the ground that its Agents, acting within the scope of their statutory authority, were impowered to search and seize without a warrant for probable cause. On this premise it contends that the evidence on the motion to suppress supports the trial Court's finding of probable cause.

The fallacy of this premise is that it assumes the power to make a warrantless search on probable cause—a power which the statute (§ 706, supra) does not grant and, by plain implication, withholds from these special enforcement Agents. While the statute authorizes an arrest without a warrant for violations committed in the Agent's presence or view, it does not authorize a warrantless search. Instead, it expressly delegates to judges and commissioners authority to issue warrants in all such cases, upon a proper showing of probable cause. It is thus manifestly clear, we think, that Congress deliberately withheld from these Agents the province of determining for themselves the existence of probable cause and the exceptional circumstances which would justify an expeditious warrantless search. This interpretation of the statute is consonant with the highly restricted province of any enforcement officer to appraise the extraordinary circumstances under which a search without a warrant would

be justified. See: Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; Taylor v. United States (10 CA), 333 F.2d 721; United States v. One 1957 Ford Ranchero Pick-up Truck (10 CA), 265 F.2d 21; and Hart v. United States (10 CA), 162 F.2d 74.

The motion to suppress did not specifically refer to the statutory limitations of the searching Agents, but it was made pursuant to Rule 41(e) and followed the prescribed Form 16, F.R.Crim.P. In this form, it was certainly sufficient to challenge the lawfulness of the seizure and the supportive evidence was entirely sufficient to require the Government to legally justify the search without a warrant. The Government does not now complain of appellant's failure to specifically invoke § 706, supra. Indeed, it does not deny that the statute is the full measure of the Agents authority in this case. We hold that the search and seizure was conducted without statutory authority and, therefore, cannot be sustained for probable cause. The motion to suppress should have been granted, and the case is reversed with directions to proceed accordingly.

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70-209

No. ~~1752~~

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1752

JOSEPH AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. Earlier opinions of the court of appeals in this case (Pet. Apps. E and F) are reported at 393 F. 2d 597 and 338 F. 2d 146, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1971. A petition for rehearing was denied on May 10, 1971. The petition for a writ of certiorari was filed on May 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

428 739 71

QUESTIONS PRESENTED

1. Whether the trial judge erred in refusing to interrogate the jury with respect to its exposure to newspaper articles appearing in newspapers during the two-day trial.

2. Whether the trial judge erred in allowing the jury to separate for lunch during the course of its deliberations.

3. Whether it was error for the court, over objection, to charge that no inference could be drawn from the failure of the defendant to take the stand.

STATEMENT

In 1963, in the United States District Court for the District of Kansas, petitioner was tried without a jury and convicted of unlawful possession and transportation of a large number of migratory birds, in violation of 16 U.S.C. 703. His conviction was subsequently reversed on the grounds that evidence as to the seizure of certain of the birds should have been suppressed as the product of an unlawful search. *Aiappa* v. *United States*, 338 F. 2d 146 (C.A. 10) (Pet. App. 21–25).

Following a remand for a new trial and upon the application of petitioner, the case was transferred from the Kansas City Division some 100 miles to the Fort Scott Division because of prejudicial publicity. Petitioner was again convicted and was sentenced to three months' imprisonment and fined $1,000. The court of appeals affirmed. 393 F. 2d 597 (Pet App. 10–20). A petition to this Court for a writ of certiorari was opposed by the government, but the Court was in-

formed that a conversation in which petitioner participated in 1961, prior to the events here involved, had been overheard electronically. The Court thereupon remanded the case *sub nom. Giordano* v. *United States*, 394 U.S. 310, for further proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165.

Upon the second remand to the district court, the government furnished petitioner with a log of the overhearing in question. Petitioner conceded that the conversation as logged had no bearing on the charges here involved, and the district court so found. On appeal, petitioner argued that the district court had improperly limited the hearing on remand and reargued some of the contentions rejected by the court of appeals on the previous appeal. The court of appeals affirmed (Pet. App. 1–6). In the present petition for certiorari, petitioner raises three issues relating to his second conviction, all of which were presented to this Court in his earlier petition, No. 124, 1968 Term, but not acted on by this Court.

ARGUMENT

1. During the two-day second trial of this case at Fort Scott, Kansas, articles appeared in the inside pages of two Kansas City newspapers, one of which referred to petitioner as a gangland figure and the other of which reported the refusal of witnesses to answer questions. At the conclusion of all the evidence, petitioner moved for a mistrial on the basis of these stories. The trial court denied the motion, saying that it had specifically instructed the jury not to read the newspapers and that to grant the request for a voir

dire might have just the opposite effect of drawing the jury's attention to the prejudicial matter. The court thereafter instructed the jury to disregard any information about this case which may have been received from sources outside of the trial (Pet. App. 19).

The determination whether there has been prejudice from news publicity must depend in each case upon its special facts. *Marshall* v. *United States,* 360 U.S. 310, 312. There was nothing here which approached the massive publicity which was held to invalidate the conviction in *Sheppard* v. *Maxwell,* 384 U.S. 333. The newspaper stories were on the inside pages of Kansas City, not local, newspapers. The charge contained in one article that petitioner was a gangland figure was not one which would itself arouse emotion. Even if, as petitioner belatedly asserts, the newspapers were available in Fort Scott, the trial judge's instructions, the non-inflammatory nature of the articles and the absence of any evidence in the record that any juror read the newspapers renders further review of issue by this Court unwarranted.

2. The trial judge did not abuse his discretion in allowing the jury to separate for lunch during deliberations. See *Hines* v. *United States,* 365 F. 2d 649 (C.A. 10); *Cardarella* v. *United States,* 375 F. 2d 222 (C.A. 8), certiorari denied, 389 U.S. 882. There is no reason to apply to Fort Scott, Kansas, the absolute rule against separation laid down in *United States* v. *D'Antonio,* 342 F. 2d 667 (C.A. 7), for the Seventh Circuit, whose major business comes from Chicago.

3. The trial court's charge to the jury with respect to petitioner's failure to take the stand,[1] which was objected to by the defense, did not violate petitioner's privilege against self-incrimination. The instruction was proper and in accordance with 18 U.S.C. 3481 The court may properly give such a charge over defense objection since it may feel that, unless instructed, the jury itself would note and draw an inference from the failure of the defendant to testify. See *United States* v. *Rimanich*, 422 F. 2d 817 (C.A. 7).

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1971.

[1] The instruction given was as follows (Pet. App. 17):

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand.

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No. 70-209

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

1. The Brief of the United States In Opposition to the grant of Certiorari reflects substantial deterioration in the sensitivity of the Solicitor General's office to prejudicial publicity.

In the Petition for Certiorari, there was cited the decision of this Court in *Janko* v. *United States,* 366 U.S. 716, where this Court, after the confession of error by the

Solicitor General, reversed a conviction on facts strikingly similar to the case of the Petitioner. The *Janko* case and the case at bar each lasted two days. The articles complained of in each case emphasized the finding of guilt of the defendant in a former trial where the conviction had been reversed.

The Tenth Circuit Court of Appeals in this case at bar stated, "The stories were, to be sure, prejudicial." (Pet. App. 20.) *Aiuppa* v. *United States*, 393 F.2d 597, 604.

Nothing justifies the statement by the Solicitor General concerning "the non-inflammatory nature of the articles".

The description of the newspaper stories given by the Tenth Circuit Court of Appeals at Pet. App. 18 and 19, emphasizes that there was available for jury consumption and prejudice, the published statement that the Petitioner was a "Gangland Figure Found Guilty in 1963 But Won Appeal", Pet. App. 18. This article went on to discuss the Petitioner's first trial, conviction and sentence and the suppression by the Court of Appeals of "more than 500 doves" found "in the trunk of the Aiuppa Cadillac". This evidence was suppressed after the first trial, and of course, to inform the jury of these facts, not admissible in the trial, could result in nothing other than extremely substantial prejudice.

The next quote at Pet. App. 19, in the second paper complained of, the Kansas City Times, was headlined, "Two Freeze Up in Aiuppa Case; Government Witnesses Refuse to Answer in Second Trial. Now Vague on Details". A subheadline erroneously read, "Judge Asks One 'Who Told You' to Forget Answers?" This article then recited various occurrences of the trial. *Aiuppa* v. *United States*, 393 F.2d 597, 603.

The fact was that the Judge did not ask this question, it was asked by the prosecutor. If a juror did infer from the newspaper article that the Judge had asked such questions of a witness, possibly out of his presence, irreparable damage would have occurred.

The complaint below and here is not that the Court failed to grant a mistrial, forthwith. The complaint is that the Court failed to take the least of the precautions suggested in *Sheppard* v. *Maxwell,* 384 U.S. 333 and cases following it.

2. After the Court had been made aware of the publication of these newspapers which were available in the stores and shops of Fort Scott, Kansas, the Trial Court then aggravated the peril of prejudice to the defendant by permitting the jury, after having heard the arguments of counsel and the instructions of the Court and being sworn for deliberation, to interrupt deliberation and to separate for lunch, and to re-assemble for further deliberation and verdict, after the possibility of exposure to the Kansas City Star and the Kansas City Times articles, held by the Court of Appeals below to be prejudicial, "to be sure". The practice of permitting jurors, having been sworn for deliberation, to separate from each other, is not consistent with the traditions of the jury system. There is no reason why a Fort Scott citizen on trial in the federal court should not be afforded the safeguards of a citizen of Chicago, as the government suggests in its Brief in Opposition.

The right to trial by jury is one of the few Constitutional guarantees not under attack by reformers, at this point. The gradual erosion of the secrecy of deliberation and the protection of the jurors from contamination in this day of prejudicial communications, will result from tolerance of the errors complained of.

3. The government draws the inference that it was to protect the Petitioner against his own bad judgment that Petitioner was overruled on his objection to the giving of the instruction described in the footnote at Page 5 of the government's Brief in Opposition.

The Petitioner believes the giving of the instruction over objection was error.

The Petitioner further urges the Court that the emphasizing of a few words and a recitation of the brief statute on the subject will make apparent his further objection to the language and form of the instruction which clearly give an inference that in the natural and regular course of events, the defendant ought to testify. The instruction given was as follows (Pet. App. 17):

> "The law does not *compel* a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the *failure* of a defendant to testify.
>
> "The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the *unqualified right not to take the stand* and you may not in any manner draw any inference against the defendant because he did not take the stand."

Section 3481, Title 18, reads as follows:

> "§3481. Competency of accused
>
> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The discussion of compulsion and of failure to testify constitute unfair comment, over objection, on the defendant's determination not to request to be a competent witness in his own behalf. Discussion of the Constitutional disability of the prosecutor to "compel" the defendant to testify has no place in such an instruction. No implication should be given to the jury that there was a "failure" to testify. While the word "failure" is used in the statute, it merely modifies the making of a request to become a witness, and certainly could not have been intended as regarding a witness' abstention from testifying as a "failure".

To give any instruction on the subject over the objection of the defendant was comment upon the Petitioner's determination not to testify. This Court has held that a reviewing court may not assume that jurors, if properly admonished, neither could nor would heed, instructions that failure of the accused to be a witness "shall not create any presumption against him". *Bruno* v. *United States* (1939), 308 U.S. 287, 84 L.Ed. 257, 60 S.Ct. 198. This Court has further held that a judge's or prosecutor's comment on the accused's silence as evidence of guilt is reversible error. *Griffin* v. *California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229. In that opinion, the Court made this comment:

> "What the jury may infer given no help from the Court is one thing. What it may infer when the Court solemnizes the silence of the accused (into evidence) against him is quite another."

The Court further, in a footnote 6, at 380 U.S. 615, said:

> "We reserve decision on whether the accused can require, as in Bruno v. United States, 308 U.S. 287, 84 L.Ed. 257, 60 S.Ct. 198, that the jury be instructed that his silence must be disregarded."

It is respectfully urged that if the defendant chooses, as the Petitioner did in the case at bar, to have no comment at all upon his silence, he should be afforded this constitutional and statutory right without interference or qualification by statements regarding his "failure" and the fact that the law affords the prosecutor no process to "compel him" to testify. It is respectfully urged that this is a subject that requires the explicit direction of this Court concerning the right to comment over objection on the defendant's silence, and the choice of language in such an instruction, so that persuasive language and words charging failures and prosecutor's disability to compel testimony will be avoided.

Respectfully submitted,

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July 26, 1971.